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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *D* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES BAGLEY,

Plaintiff,

v.
PAUL TEIRSTEIN; DOES 1 through
100, inclusive,

Defendant.

CASE NO. 15cv2396-WQH-WVG

ORDER

HAYES, Judge:

The matter before the Court is the motion to remand (ECF No. 18) filed by Plaintiff James Bagley.

I. Background

On September 15, 2015, Plaintiff James Bagley initiated this action by filing a Complaint in San Diego County Superior Court, Case Number 37-2015-00031000-CU-PO-NC, alleging claims for personal injury, property damage, and loss of income arising from an airplane crash. (ECF No. 1-2 at 4). The Complaint alleges a negligence cause of action and asserts that Defendant Paul Teirstein was piloting a “tow glider” and caused the “tow plane to be unable to disengage the glider . . . and caus[ed] the [tow plane] to fly straight into the ground.” (ECF No. 1-2 at 7). The Complaint alleges

Defendant Paul Teirstein as pilot in command of a tow glider failed to maintain directional control so as to cause it to turn violently causing the tow plane to be unable to disengage the glider and violently raising the tail of the tow plane causing it to fly straight into the ground. Defendant Paul Teirstein was not competent nor sufficiently current or capable to fly the glider in accordance with Federal Aviation regulations.

1 *Id.*

2 On October 22, 2015, Defendant filed a notice of removal under 28 U.S.C. §
 3 1331, based on Plaintiff's allegation that Defendant failed to comply with Federal
 4 Aviation Regulations ("FAR"). (ECF No. 1 at 3). Defendant contends that removal
 5 is properly based on "federal question" jurisdiction. *Id.* at 7.

6 On November 3, 2016, Defendant filed an answer. (ECF No. 2).

7 On July 18, 2016, Plaintiff filed a motion to remand. (ECF No. 18). On August
 8 8, 2016, Defendant filed an opposition. (ECF No. 20). On August 12, 2016, Plaintiff
 9 filed a reply. (ECF No. 21).

10 **II. Discussion**

11 Plaintiff contends that the complaint asserts claims under state law and that this
 12 Court lacks subject matter jurisdiction. (ECF No. 18-1 at 1, 4). Plaintiff contends that
 13 the allegation that Defendant violated the FAR is not the "central allegation of
 14 negligence" against Defendant. *Id.* at 2. Plaintiff contends that the Federal Aviation
 15 Act ("FAA") does not create a federal cause of action for personal injury suits and does
 16 not provide grounds for removal based on federal question jurisdiction. *Id.* at 6.
 17 Plaintiff contends that complete preemption does not provide a proper grounds for
 18 removal in this case because "[c]omplete preemption giving rise to removal has been
 19 found only in narrow areas . . ." *Id.* at 7. Plaintiff contends that Congress has not
 20 expressed any intent that federal aviation regulations completely preempt ordinary state
 21 law personal injury claims. *Id.*

22 Defendant contends that federal subject matter jurisdiction is satisfied because
 23 Plaintiff's complaint raises a federal issue. (ECF No. 20 at 3). Defendant contends that
 24 Plaintiff's claim is "wholly dependent upon compliance with federal regulations."
 25 (ECF No. 20 at 9). Defendant contends that the reference to the FAR regulations in the
 26 Complaint raises the issue of pilot qualifications, which are completely preempted by
 27 federal law. *Id.* at 4. Defendant alleges that the Court may "assert subject matter
 28 jurisdiction over other claims" through supplemental jurisdiction, "even if . . . the Court

1 lacks federal-question jurisdiction over any portion of the complaint.” *Id.* at 10.

2 **A. Legal Standards**

3 “Under 28 U.S.C. § 1441, a defendant may remove an action filed in state court
 4 to federal court if the federal court would have original subject matter jurisdiction over
 5 the action.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1243 (9th Cir.
 6 2009). Absent diversity of citizenship, a federal court has subject matter jurisdiction
 7 “when a federal question is presented on the face of the plaintiff’s properly pleaded
 8 complaint.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted);
 9 *see also* 28 U.S.C. § 1331. The well-pleaded complaint rule “makes the plaintiff the
 10 master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on
 11 state law.” *Caterpillar*, 482 U.S. at 392. Federal jurisdiction must exist at the time the
 12 complaint is filed and at the time removal is effected. *Strotek Corp. v. Air Transp.*
 13 *Ass’n of Am.*, 300 F.3d 1129, 1131 (9th Cir. 2002).

14 A party can challenge removal based on lack of subject matter jurisdiction
 15 through a motion to remand. 28 U.S.C. § 1447. There is a “strong presumption against
 16 removal” such that the removing party “always has the burden of establishing that
 17 removal is proper.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “The
 18 removal statute is strictly construed, and any doubt about the right of removal requires
 19 resolution in favor of remand.” *Moore-Thomas*, 553 F.3d at 1244.

20 **B. Federal Question Jurisdiction**

21 “Federal courts may exercise federal-question jurisdiction over an action in two
 22 situations. First and most commonly, a federal court may exercise federal-question
 23 jurisdiction if a federal right or immunity is an element, and an essential one, of the
 24 plaintiff’s cause of action.” *Provincial Gov’t of Marinduque v. Placer Dome, Inc.*, 582
 25 F.3d 1083, 1086 (9th Cir. 2009) (quotations omitted). “Second, a federal court may
 26 have such jurisdiction if a state-law claim ‘necessarily raise[s] a stated federal issue,
 27 actually disputed and substantial, which a federal forum may entertain without
 28 disturbing any congressionally-approved balance of federal and state judicial

1 responsibilities.”” *Id.* (quoting *Grable & Sons Metal Prod., Inc. v. Darue Eng’g &*

2 *Mfg.*

3 , 545 U.S. 308, 314 (2005)). “Such a federal issue must be ‘a substantial one,

4 indicating a serious federal interest in claiming the advantages thought to be inherent

5 in a federal forum.”” *Id.* at 1086-87 (citation omitted). The “mere presence of a federal

6 issue in a state cause of action does not automatically confer federal question

jurisdiction.” *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

7 In *Merrell Dow*, the Supreme Court considered “whether the incorporation of a

8 federal standard in a state-law private action, when Congress has intended that there

9 not be a federal private action for violations of that federal standard” confers federal

10 jurisdiction. *Id.* at 805. The plaintiffs brought state common law tort claims against

11 a drug manufacturer and distributor. The plaintiffs alleged that ingestion of a particular

12 drug during pregnancy resulted in birth defects. The drug company petitioned for

13 removal from state court to federal court based on the plaintiff’s allegation in their

14 complaint that the drug was “misbranded in violation of the Federal Food Drug and

15 Cosmetic Act.” *Id.* at 805-06. The Court held that federal jurisdiction was improper

16 in part because no private, federal cause of action existed. *Id.* at 817. The Court stated

17 that, “[g]iven the significance of the assumed congressional determination to preclude

18 federal private remedies, the presence of the federal issue as an element of the state tort

19 is not the kind of adjudication for which jurisdiction would serve congressional

20 purposes and the federal system.” *Id.* at 814.

21 In *Grable*, the Supreme Court resolved a circuit split that followed the *Merrell*

22 *Dow* decision and held that the presence of a federal cause of action is not dispositive

23 of federal-question jurisdiction. *Grable*, 545 U.S. at 318. The plaintiff in *Grable*

24 brought a state quiet title action following the Internal Revenue Service’s seizure of

25 plaintiff’s property due to a tax delinquency and subsequent sale of the property to its

26 current owner. *Id.* at 310-11. The plaintiff alleged that the current owner’s title was

27 invalid “because the IRS had failed to notify [the plaintiff] of its seizure of the property

28 in the exact manner required by [26 U.S.C. § 6335].” *Id.* at 311. The Court held that

1 removal was proper, despite the absence of a federal cause of action. The Court
 2 determined that the meaning of the federal statute was an essential element of the quiet
 3 title claim that was “actually in dispute,” and “appear[ed] to be the only legal or factual
 4 issue contested in the case.” *Id.* at 315. The Court stated that “*Merrell Dow* should be
 5 read in its entirety as treating the absence of a federal private right of action as
 6 evidence relevant to, but not dispositive of [Congressional intent].” *Id.* The Court held
 7 that a federal issue embedded in a state law claim confers federal jurisdiction when the
 8 “state-law claim necessarily raise[s] a stated federal issue, actually disputed and
 9 substantial, which a federal forum may entertain without disturbing any
 10 congressionally approved balance of federal and state judicial responsibilities.” *Id.* at
 11 314.

12 In this case, Plaintiff does not have a private federal remedy, because Congress
 13 did not include a federal cause of action for personal injury suits in the FAA. *See*
 14 *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir.
 15 2009) (“The FAA doesn’t create a federal cause of action for personal injury suits.”).
 16 The lack of a federal cause of action under the FAA is evidence that Congress did not
 17 intend to provide federal-question jurisdiction through the FAR and FAA. *Merrell*
 18 *Dow*, 478 U.S. at 817 (“We conclude that a complaint alleging a violation of a federal
 19 statute as an element of a state cause of action, when Congress has determined that
 20 there should be no private, federal cause of action for the violation, does not state a
 21 claim ‘arising under the Constitution, laws, or treaties of the United States.’”). In this
 22 case, allowing Defendant to remove Plaintiff’s state law tort claim to this Court
 23 because of a reference to the FAR would disturb the “congressionally approved balance
 24 of federal and state responsibilities” that the Legislature indicated by declining to
 25 provide a cause of action under the FAA. *Grable*, 545 U.S. at 318.

26 The Complaint alleges in part that Defendant “was not competent nor
 27 sufficiently current or capable to fly the glider in accordance with Federal Aviation
 28 regulations.” (ECF No. 1-2 at 7). However, to confer federal-question jurisdiction

1 over state law tort claims, the claims must involve a substantial and contested federal
 2 issue “indicating a serious federal interest in claiming the advantages thought to be
 3 inherent in a federal forum.” *Grable*, 545 U.S. at 313. The “mere presence” of the
 4 FAR in Plaintiff’s state law cause of action for negligence does not necessarily raise
 5 a substantial federal issue. *Merrell Dow*, 478 U.S. at 804. In this case, the FAR are not
 6 a central issue to the Defendant’s alleged negligence. There is no indication of a
 7 disputed federal issue. In *Grable*, where removal was proper despite the fact that no
 8 federal cause of action existed, the meaning of a federal statute was both disputed and
 9 determinative of the case. In this case, the parties may dispute the applicability of the
 10 FAR, but neither Plaintiff nor Defendant contend that there is a dispute over the
 11 meaning of the FAR.¹

12 The Court concludes that Plaintiff’s claims do not involve a substantial federal
 13 issue and federal question jurisdiction does not provide grounds for removal. *See*
 14 *Brown v. City & Cty of Honolulu*, No. CV 14-00354 HG-KSC, 2015 WL 1564961, at
 15 *2-3 (D. Haw. Apr. 7, 2015).

16 **C. Preemption**

17 **i. Complete Preemption**

18 The jurisdictional doctrine of complete preemption may also provide grounds for
 19 removal of a claim to federal court. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63
 20 (1987). Complete preemption is an exception to the well-pleaded complaint rule that
 21 exists where, “[t]he Supreme Court has concluded that the preemptive force of some
 22 statutes is so strong that they ‘completely preempt’ an area of state law.” *Balcorta v.*
 23 *Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citing *Metro.*
 24 *Life Ins. Co.*, 481 U.S. at 65). When the complete preemption doctrine applies, “any
 25 claim purportedly based on that preempted state law is considered, from its inception,
 26 a federal claim, and therefore arises under federal law.” *Id.* (citing *Franchise Tax Bd.*
 27

28 ¹ In fact, Plaintiff states that “[Defendant] is correct that federal law will likely supply the standard of care.” (ECF No. 18-1 at 5).

1 *Of Cal v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 24
 2 (1983)). Complete preemption is a jurisdictional doctrine distinct from ordinary
 3 preemption and is limited in application. *Wayne v. DHL Worldwide Express*, 294 F.3d
 4 1179, 1183-84 (9th Cir. 2002); *Retail Prop. Trust v. United Bhd. of Carpenters &*

5 *Joiners of Am.*, 768 F.3d 938, 947-48 (9th Cir. 2014) (stating that the Supreme Court
 6 has only recognized three instances of complete preemption). Complete preemption
 7 is a “doctrine applicable to removal jurisdiction only” and “is not a doctrine of
 8 defensive preemption.” *Retail Prop. Trust*, 768 F.3d at 948. “[C]omplete preemption
 9 occurs only when Congress intends not merely to preempt a certain amount of state
 10 law, but also intends to transfer jurisdiction of the subject matter from state to federal
 11 court.” *Wayne*, 294 F.3d at 1183.

12 In this case, Plaintiff’s state law negligence claims are not subject to complete
 13 preemption as a result of Plaintiff’s reference to the FAR in the Complaint. Courts
 14 have concluded that Congress did not intend the FAA to preempt all state law claims.
 15 See *Gilstrap*, 709 F.3d at 1004 (“[W]e have in several instances held that state-law
 16 personal-injury claims are not displaced by the FAA.”). In *Martin ex rel. Heckman*, the
 17 court held that Congress did not intend the FAA to “exclude all state law personal
 18 injury suits from the area of air travel” and stated that “[t]he FAA doesn’t create a
 19 federal cause of action for personal injury suits.” 555 F.3d at 808. “[T]he complete
 20 preemption doctrine applies only to ‘claim[s] which come within the scope of [a
 21 federal] cause of action.’” *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013)
 22 (citation omitted); see also *Moore-Thomas*, 553 F.3d at 1245 (“Our holding is
 23 buttressed by the Supreme Court’s explanation that a federal statute must provide the
 24 ‘exclusive cause of action’ for complete preemption to apply”).

25 The Court finds that the complete preemption doctrine is inapplicable and does
 26 not provide grounds for removal. See *Webb v. Desert Bermuda Dev. Co.*, 518 F. App’x
 27 521, 522 (9th Cir. 2013).

28 **ii. Ordinary Preemption**

1 In contrast to the jurisdictional doctrine of complete preemption, ordinary
 2 preemption operates as a federal defense. *Retail Prop. Trust*, 768 F.3d at 948; *see also*
 3 *Balcorta*, 208 F.3d at 1107 n.7. Ordinary preemption exists in three forms: express,
 4 field, and conflict.² *Retail Prop. Trust*, 768 F.3d at 948. Express preemption exists
 5 where Congressional intent is explicitly stated in the statutory language. *Cipollone v.*
 6 *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Conflict preemption occurs where state
 7 law “actually conflicts with federal law.” *Id.* State law is preempted through field
 8 preemption “if federal law so thoroughly occupies a legislative field ‘as to make a
 9 reasonable inference that Congress left no room for the States to supplement it.’” *Id.*
 10 (quoting *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153) (citations
 11 omitted).

12 Complete preemption and ordinary preemption are two distinct doctrines that
 13 occur in separate procedural contexts. *Retail Prop. Trust*, 768 F.3d at 948. Only
 14 complete preemption is applicable to removal jurisdiction. *See id.* Complete
 15 preemption can confer federal jurisdiction and provide grounds for removal; ordinary
 16 preemption is insufficient to confer federal jurisdiction. *See id.*; *Moore-Thomas*, 553
 17 F.3d at 1244; *Balcorta*, 208 F.3d at 1107 n.7. It is well-settled that a defendant cannot
 18 establish federal subject matter jurisdiction by raising a defense such as preemption.
 19 *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003) (“Thus, a defense that relies on
 20 . . . the pre-emptive effect of a federal statute . . . will not provide a basis for removal.”)
 21 (citations omitted); *Newberry v. Pac. Racing Ass'n*, 854 F.2d 1142, 1146 (9th Cir.
 22 1988) (“Ordinarily, a case may not be removed on the basis of a federal defense,
 23 including the defense of preemption, even if the defense is anticipated in the complaint
 24 and both parties concede that it is the only question truly at issue.”).

25 In this case, removal based on preemption is only proper if the FAA and FAR

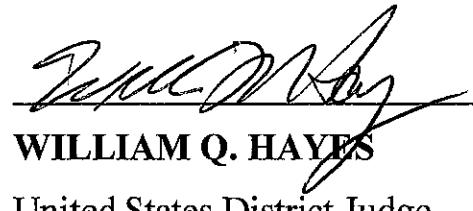
26
 27 ² “It is true that the defense of field preemption and the doctrine of complete
 28 preemption both rest on the breadth, in some crude sense, of a federal statute’s
 preemptive force. The two types of preemption, are, however, better considered
 distinct.” *Retail Prop. Trust*, 768 F.3d at 949 (quoting *Sullivan v. Am. Airlines, Inc.*,
 424 F.3d 267, 273 n.7 (2d Cir. 2005)).

1 completely preempt Plaintiff's claims because ordinary preemption cannot provide
 2 grounds for removal. Defendant contends that two Ninth Circuit decisions, *Ventress*
 3 *v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014), and *Montalvo v. Spirit Airlines*, 508
 4 F.3d 464 (9th Cir. 2007), hold that the FAA preempts all state law claims in the field
 5 of aviation safety regarding pilot qualifications. (ECF No. 20 at 7-8). However, these
 6 cases both address the defensive preemptive effect of the FAA and FAR; neither case
 7 addresses complete preemption as grounds for removal jurisdiction. The defendants
 8 in *Montalvo* and *Ventress* did not rely on complete preemption to establish federal
 9 subject matter jurisdiction and remove their actions to federal court. *See Montalvo*, 508
 10 F.3d at 469-70; *Ventress*, 747 F.3d at 720. In *Montalvo*, the parties were properly
 11 removed to federal court based on diversity jurisdiction and preemption was raised in
 12 a motion to dismiss. 508 F.3d at 469-470. In *Ventress*, the plaintiffs initially brought
 13 suit in federal court and the defendants raised preemption as a defense in a motion for
 14 judgment on the pleadings and later motion for reconsideration. *Ventress*, 747 F.3d at
 15 720; *Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007). While the court in both
 16 *Montalvo* and *Ventress* held that the FAA does have a preemptive effect in certain areas
 17 due to pervasive regulations, this analysis occurred in the context of field preemption,
 18 which cannot establish subject matter jurisdiction. *Ventress*, 474 F.3d at 720-23;
 19 *Montalvo*, 508 F.3d at 470. Ordinary preemption cannot confer federal subject matter
 20 jurisdiction and provide grounds for removal.

21 **III. Conclusion**

22 IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (ECF No. 18) is
 23 GRANTED. Pursuant to 28 U.S.C. § 1447(c), this action is remanded to San Diego
 24 County Superior Court, where it was originally filed and assigned case number 37-
 25 2015-00031000-CU-PO-NC.

26 DATED: 10/5/16



WILLIAM Q. HAYES
 United States District Judge